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FEDERAL COMMUNICATIONS COMMISSION  
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BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554

In The Matter Of	)	
	)	
Petition of the Wireless Consumers Alliance,	)	File No. WT 99-263
Inc. for a Declaratory Ruling concerning whether	)	
the provisions of the Communications Act of	)	
1934, as amended, or the jurisdiction of the	)	
Federal Communications Commission	)	
thereunder, serve to preempt state courts from	)	
awarding monetary relief against commercial	)	
mobile radio service ("CMRS") providers (a) for	)	
violating state consumer protection laws	)	
prohibiting false advertising and other fraudulent	)	
business practices, and/or (b) in the context of	)	
contractual disputes and tort actions adjudicated	)	
under state contract and tort laws.	)	

**COMMENTS OF  
SBC WIRELESS INC.**

SBC Wireless Inc. files these comments in opposition to the Petition filed by the Wireless Consumers Alliance, Inc. ("Petitioner") seeking broad declaratory relief regarding the Federal Communications Commission's exclusive right to regulate the rates charged by Commercial Mobile Radio Service (CMRS) providers. Petitioner is a named plaintiff in a class action complaint against the Los Angeles Cellular Telephone Company ("LA Cellular"). After having its case dismissed in the California lower court Petitioner filed an appeal which was stayed at Petitioner's request while they sought this declaratory ruling. Petitioner requests a ruling from the Commission declaring that an award of monetary damages by a state court against a CMRS provider based on state law can never be considered regulation of the "rates charged" by a CMRS provider and thus preempted by 47 USC 332©(3). Petitioner claims that the relief it is requesting can be granted

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“without delving into the facts of any specific case now or in the future”.<sup>1</sup> The Commission is being asked to make such a blind declaration despite the fact that various Courts have ruled, based on the facts of the specific case before them, that an award of monetary damages would constitute the regulation of “rates charged” and thus is preempted.

The relief requested should not be granted. The Commission should instead reaffirm that it alone has the right to regulate the rates charged by CMRS providers. The Commission should also clarify that the issue of whether a remedy sought in a class action suit infringes on its exclusive right to regulate the “rates charged” depends upon the facts of the case and the relief requested—not merely the inclusion of a state law claim by the plaintiff’s attorney. The Commission cannot and should not give up its exclusive statutory authority to regulate the “rates charged” by CMRS providers—especially without examining the facts of the underlying action.

**1. The Commission has the sole authority to Regulate the Rates Charged by CMRS Providers.**

Section 332©(3) of the Communications Act provides that “no State or local government shall have the authority to regulate the . . . rates charged by any commercial mobile service”. The authority to regulate the rates charged by CMRS providers rests with the Commission. Contrary to Petitioner’s implication,<sup>2</sup> the Commission’s decision to forebear from requiring the filing of tariffs by CMRS providers or the actual setting of

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<sup>1</sup> Petition for Declaratory Ruling, pp. 2-3.

<sup>2</sup> Id. Pp. 12-13.

CMRS rates through a rate of return process does not equate to a delegation or relinquishment of the authority to regulate the rates charged.<sup>3</sup>

The decision to forebear was based on the belief that market forces, combined with other Commission rules and federal statutory requirements would be sufficient to protect consumers from discriminatory rates and practices. As the Commission stated in explaining its decision to forebear:

Compliance with Sections 201, 202 and 208 is sufficient to protect consumers. In the event that a carrier violated Section 201 or 202, the Section 208 complaint process would permit challenges to a carrier's rates or practices . . .<sup>4</sup>

Further, the decision to forbear from active regulation of the rates charged was not meant to undermine the Commission's preemption of such regulation by the states. As the Commission noted:

While we recognize that the states have a legitimate interest in protecting the interests of telecommunications users in their jurisdictions, we also believe that competition is a strong protector of these interests and that state regulation in this context could inadvertently become a burden to the development of competition. Our preemption rules will help promote investment in the wireless infrastructure by preventing burdensome and unnecessary state regulatory practices that impede our federal mandate for regulatory parity.<sup>5</sup>

Thus, the fact that the Commission does not require the filing of rates does not diminish its exclusive jurisdiction over the right to regulate the rates charged.

## **2. State Law Claims Challenging the Rates Charged by CMRS Providers Violate Section 332©(3).**

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<sup>3</sup> See, e.g. In re Long Distance Corp., Complainant v. Yankee Microwave Inc., Defendant, 8 FCC Rcd. 85 (1993), aff'd on other grounds, 10 FCC Rcd. 654 (1995) wherein the Common Carrier Bureau recognized that an award of damages may violate the prohibition against retroactive ratemaking even where the rates were not tariffed but rather were set by contract. The Bureau noted "Even if the Commission were to determine that the rates in the (disputed) contract had contravened Sections 201 and 202 of the Act, it could not lawfully prescribe rates having a retroactive effect. The Commission's authority to determine and prescribe rates derives from Section 205 of the Act which authorizes rates to be prescribed only on a prospective basis."

<sup>4</sup> In the Matter of the Implementation of Sections 3(n) and 332 of the Communications Act Regulatory Treatment of Mobile Services, 9 FCCR 1411, 1479 (1993).

<sup>5</sup> Id., p. 1421.

Petitioner requests a ruling that the Commission's exclusive jurisdiction over the right to regulate the rates charged by CMRS providers can never preempt a state court's awarding of monetary damages in a deceptive advertising, fraudulent business practices, consumer protection law, tort or contract action. In order to grant the relief requested the Commission must accept as true the premise that an award of monetary damages in a state proceeding can never equate to regulation of the rates charged by CMRS providers regardless of the underlying fact situation.<sup>6</sup> The Commission cannot accept such a premise as true—especially when the relief many times is requested in class action cases affecting entire customer bases and may challenge not only the rate charged but also the quality of service supplied. As one Federal Court stated “It is undisputed that like legislative or administrative action, judicial action constitutes a form of state regulation. Thus, like state legislative action, state court adjudications threaten the uniformity of regulation envisioned by a congressional scheme.”<sup>7</sup>

The United States Supreme Court, in Arkansas Louisiana Gas v. Hall, recognized that the mere fact that a suit is brought under state law “does not rescue it, for when Congress has established an exclusive form of regulation, ‘there can be no divided authority over interstate commerce’”.<sup>8</sup> In ruling on a breach of contract claim regarding the purchase of federally regulated gas, the Court noted that “no matter how the ruling of the Louisiana Supreme Court (granting damages) may be characterized . . . it amounts to nothing less than the award of a retroactive rate increase”. A class plaintiff's claim for damages is generally based on the difference between the rate charged and what a reasonable rate

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<sup>6</sup> Petitioner claims that such relief should be granted without even considering the specific facts of the case or how the relief would be calculated.

<sup>7</sup> In re Comcast Cellular Telecomm. Litigation, 949 F. Supp. 1193, 1201 n. 2 (E.D. Pa. 1996).

<sup>8</sup> Arkansas Louisiana Gas Co. v. Hall, 453 U.S. 571, 578 (1981).

would be for the service had it been as allegedly contracted for, allegedly advertised as or the alleged fraud not occurred. The determination of such a damage award necessarily involves determining what the Court or trier of fact feels should be a reasonable rate for the service provided—a decision that rests solely with the Commission.

For example, the Federal District Court for the Eastern District of Pennsylvania found that various state law claims of the class plaintiff regarding the practice of rounding airtime up to the next full minute at the end of a call were preempted by Section 332©(3) prohibiting state regulation of rates charged.<sup>9</sup> The class plaintiffs claimed that they were not challenging the rates charged but rather the failure to disclose them.<sup>10</sup> The Federal Court noted however that the “claims alleged by the plaintiffs present a direct challenge to the way in which (the cellular provider) actually calculates the length of a cellular phone call and the rates charged for such a call. Thus any state regulation of these practices is explicitly prohibited by the terms of the Act”.<sup>11</sup> The Court went on to note that “while none of these claims pose an explicit challenge to the rates charged by Comcast for phone service, a careful reading of the complaint and the remedies sought by the plaintiffs demonstrates that the true gravaman of the complaint is a challenge to Comcast’s rates and billing practices”.<sup>12</sup>

Similarly, many times the state action claim is attacking both the rate charged and the quality of service provided. Bell Atlantic Mobile Inc. (“BAM”) previously outlined for the Commission such a suit it was defending in New Jersey attacking “the

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<sup>9</sup> In re Comcast Cellular Telecomm. Litigation, 949 F. Supp. 1193 (E.D. Pa. 1996).

<sup>10</sup> Id., 1199-1200. The Court noted that “much of the briefs filed surrounding the motion to remand focuses on whether the Plaintiffs’ complaint is, as they assert, aimed solely at Comcast’s failure to adequately disclose its practice of billing for non-communication time and rounding-up the length of calls.

<sup>11</sup> Id.,

<sup>12</sup> Id., at 1203.

technological and performance characteristics” of BAM’s service.<sup>13</sup> The Plaintiffs in the BAM suit plead violations of New Jersey consumer protection laws, common law fraud and negligent misrepresentation.<sup>14</sup> The plaintiffs sought “improvements” to BAMs service quality, refunds to compensate plaintiffs for their “actual damages”, punitive damages and attorneys fees.<sup>15</sup> The plaintiffs claimed that BAM had “lured more customers than it can successfully handle” and had received “substantially increased revenues resulting from the tremendous increase in the number of cellular telephone users” but had “failed to expand the technological capability of [its] existing systems” in order to maintain the “the level of service to which callers are accustomed”.<sup>16</sup> Thus, the Court or trier of fact would not only be determining what an appropriate rate should be but would also first need to determine an appropriate performance quality standard for the cellular system.

The detariffing of the wireless industry was not meant to signal a shifting of the authority to regulate the wireless industry from the Commission to the Courts and the imaginative pleadings of the plaintiff class action bar. Rather, the Commission retains its exclusive right to regulate the rates charged, performance standards and other aspects of the provision of wireless service. Determining whether a state law cause of action involves the regulation of the “rates charged” necessarily involves an examination of the underlying facts and whether the granting of a monetary award would impede on the Commission’s exclusive authority. The states have the authority to regulate “other terms

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<sup>13</sup> In the Matter of Southwestern Bell Mobile Systems, Inc. Petition for Declaratory Ruling Regarding the Just and Reasonable Nature of, and State Law Challenges to, Rates Charged by CMRS Providers When Charging for Incoming Calls and Charging for Calls in Whole-Minute Increments, Comments of Bell Atlantic Mobile, Inc filed December 24, 1997, at p. 5 quoting from Plaintiffs’ Complaint.

<sup>14</sup> Id.

<sup>15</sup> Id.

<sup>16</sup> Id. at p. 18 *quoting from* Plaintiffs Complaint.

and conditions” and many times the issue of whether a cause of action involves “other terms and conditions” or the regulation of “rates charged” may be hotly debated. The Commission should not however issue the ruling requested here which would eliminate such debate anytime a state cause of action for damages was plead. Such an all-encompassing rule would be abandoning the Commission’s statutory obligation to be the sole arbiter of the rates charged by CMRS providers and the sole regulator of the “rates charged”. The petition for Declaratory Ruling should be denied.

### CONCLUSION

For the reasons stated herein the Commission should not declare that the award of monetary damages against a CMRS carrier could never amount to the regulation of the rates charged by a CMRS provider. The Petition for Declaratory Ruling should be denied.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I, Bruce E. Beard, an attorney for SBC Wireless, Inc., do hereby certify that copies of the foregoing Comments of SBC Wireless, Inc. were served on the 10<sup>th</sup> day of September, 1999, by first class mail, postage prepaid, and/or hand delivered, to the following:

  
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